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Attorneys for Plaintiffs Merck & Co., Inc. and Merck Sharp & Dohme Corp.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MERCK & CO., INC., and MERCK SHARP & DOHME CORP., Plaintiffs, v. MERCK KGAA, Defendant.	Case No. 2:16-cv-00266-ES-MAH Hon. Esther Salas, U.S.D.J. Hon. Michael A. Hammer, U.S.M.J.

DECLARATION OF KWAKU AKOWUAH IN SUPPORT OF PLAINTIFFS' MOTION TO SEAL MATERIALS

I, Kwaku Akowuah, hereby state as follows:

1. I am an attorney and member of the bars of New York and the District of Columbia. I am a partner with the law firm of Sidley Austin LLP. I have been admitted *pro hac vice* in this matter to represent Plaintiffs Merck & Co., Inc. and Merck Sharp & Dohme ("Plaintiffs") and I make this declaration upon personal knowledge.

2. I submit this Declaration in support of Plaintiffs' Motion to Seal Materials submitted in the parties' joint letter brief (Dkt. 146) filed under temporary seal.

3. This matter is one of multiple litigations happening globally which arise out of trademark disputes between these same parties.

4. At the outset of discovery in this case, the parties negotiated a Stipulation and Protective Order Regarding Confidentiality of Documents and Other Information Produced in Discovery ("Protective Order") (Dkt. 67) because they are engaged in litigation that involves discovery which both sides agreed should be protected and used exclusively for purposes of this litigation, subject to the Court's authority to modify the Protective Order for good cause shown.

5. The redacted portions of the parties' joint letter brief that Plaintiffs seek to maintain under seal are all excerpts of discovery materials that Plaintiffs produced to Defendant in this case. **Exhibit A** attached hereto is a true and correct copy of the redacted version of the joint discovery letter filed at Dkt. 147.

6. On May 27, 2020, the Court ordered a modification of Paragraph 19 of the Protective Order to allow Defendant to use two deposition excerpts in the case captioned *EMD Millipore Corp. & Merck KGaA et al. v. HDI-Gerling Amer. Ins. Co.*, Civ. No. 1:20-cv-10244 (D. Mass.).

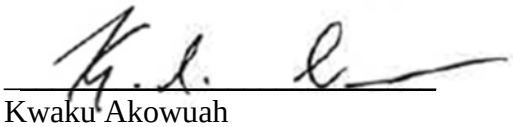
7. If not sealed, Plaintiffs' discovery excerpts in the parties' joint letter brief would

be publicly available and could be used for other purposes.

8. **Exhibit B** attached hereto is a true and correct copy of email correspondence dated May 29, 2020 between me and David Bernstein, counsel for Defendant, concerning the discovery excerpts in the parties' joint letter brief.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 5, 2020



Kwaku Akowuah

EXHIBIT A

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300 Carnegie Center | Suite 220 |Princeton, NJ 08540
A Pennsylvania LLP | Stephen M. Orlofsky, New Jersey Administrative Partner
blankrome.com

Phone: *(609) 750-2646*
Fax: *(609) 897-7286*
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May 22, 2020

VIA ECF [redacted]
Honorable Michael A. Hammer
United States Magistrate Judge
U.S. District Court, District of New Jersey
Martin Luther King, Jr. Federal Building & U.S. Courthouse
50 Walnut Street
Newark, New Jersey 07101

Re: Merck & Co., Inc. et al. v. Merck KGaA
Civil Action No. 16-0266 (ES) (MAH)

Dear Judge Hammer:

This firm, along with Debevoise & Plimpton LLP, represents Defendant Merck KGaA ("Defendant") in the above-referenced matter. We submit this letter jointly with McCarter & English LLP and Sidley Austin LLP, counsel for Plaintiffs Merck & Co., Inc. and Merck Sharp & Dohme Corp. ("Plaintiffs").

The parties respectfully request that the Court resolve whether the Defendant can disclose two deposition excerpts in a lawsuit between the Defendant and its insurance carrier under the Stipulation and Protective Order Regarding Confidentiality of Documents and Other Information Produced in Discovery entered by the Court on March 6, 2017 (ECF 67, hereinafter, the "Protective Order")

The parties have met and conferred in good faith on this issue, but have been unable to reach a resolution.

Defendant's Position

Defendant is involved in litigation with its insurance carrier, HDI-Gerling America Insurance Company ("HDI"), concerning potential coverage related to this action. *EMD Millipore Corp. & Merck KGaA, Darmstadt, Germany v. HDI-Gerling America Ins. Co.*, Civil Action No. 1:20-cv-10244 (D. Mass.) (the "Insurance Action"). The precise nature of Plaintiffs' contentions in this action is directly relevant to whether Defendant is entitled to insurance coverage and thus to

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Defendant's claim against HDI in the Insurance Action.

Although some of this information is available at a fairly general level in the Complaint, Defendants have identified two deposition questions and answers from the Rule 30(b)(6) deposition of Plaintiffs in which Plaintiffs clarified their position as to how they have been harmed by Defendant's advertising that is the basis of Plaintiffs' false advertising causes of action (together the "Requested Disclosures"). These are:

[redacted]

Transcript of Deposition of Plaintiffs' Rule 30(b)(6) Representative 73:3-73:22 (designated Confidential under the Protective Order).

[redacted]

Id. 330:17-331:4 (designated Confidential under the Protective Order).

Because the Requested Disclosures are not disclosed publicly in any other documents, Defendant asked Plaintiffs' to remove the Confidential designations from these passages and allow their disclosure in the Insurance Action. Despite the limited nature of this request, and the fact that ***none of Plaintiffs' confidential information or trade secrets are disclosed in these short***

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passages,[1] Plaintiffs have refused to allow Defendant to use the Requested Disclosures in the Insurance Action because (1) the parties negotiated a pre-discovery blanket Protective Order, and Paragraph 19 generally prohibits disclosure of discovery information,[2] and (2) Defendant or other parties in the Insurance Action might request additional information be disclosed at a later date. *See* Exhibit A, email from Bill Krovatin of Plaintiffs' Office of General Counsel. Neither of those reasons should prevent disclosure.

Neither Paragraph 19 nor the Protective Order more generally should allow a party to hold hostage the non-confidential details of their very causes of action in an attempt to prevent Defendant from recovering from its insurer. The law is clear that, even where the parties have negotiated and entered into a pre-discovery blanket Protective Order, that order may be modified as necessary unless the party seeking protection can show good cause to prevent disclosure. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994) ("[T]he party seeking to modify the order of confidentiality must come forward with a reason to modify the order. Once that is done, the court should then balance the interests, . . . to determine whether good cause still exists for the order."); *Pearson v. Miller*, 211 F.3d 57, 73 (3d Cir. 2000) ("The parties may later seek to modify the [protective] order as appropriate at a later stage."). Plaintiffs have not and cannot meet their burden to establish that good cause exists to prohibit the Requested Disclosures. *See United States v. Wecht*, 484 F.3d 194, 211–12 (3d Cir. 2007), *as amended* (July 2, 2007) ("when there is an umbrella protective order[,] the burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the protective order") (citation omitted). Contrary to Plaintiffs' unsupported assertions herein, the standard set forth in *Pansy* applies both to third parties seeking disclosure, as well as litigants seeking to disclose materials in a separate litigation. *See*, *e.g.*, *INVISTA*, 2013

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[1] Under the Protective Order, information may be designated "Confidential" when counsel believes "in good faith" that the material "is subject to protection under Rule 26(c) of the Federal Rules of Civil Procedure," Protective Order ¶ 1, which protects material from disclosure if it would cause "a party . . . annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P 26 (c).

[2] Paragraph 19 of the Protective Order provides: "All documents and information received in discovery in this action, including Confidential Material or Attorney's Eyes Only Material and/or EU Personal Data, and all other material, whether or not ultimately made part of the public record, shall be used by the receiving party solely for purposes of the above-captioned litigation, unless set forth by Court Order, including any appeals, and for no other business, litigation or other purpose whatsoever."

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WL 1867345, at *2 (use of documents in another litigation by party was permitted).[3]

To determine whether the party wishing to retain protection over discovery material has demonstrated good cause, courts in this Circuit look to whether (1) the disclosure will violate any privacy interests; (2) the information is being sought for a legitimate purpose or for an improper purpose; (3) the disclosure of the information will cause a party embarrassment; (4) the confidentiality is being sought over information important to public health and safety; (5) the sharing of information among litigants will promote fairness and efficiency; (6) a party benefitting from the order of confidentiality is a public entity or official; (7) the case involves issues important to the public; and (8) the reliance of the original parties on the protective order. *Pansy*, 23 F.3d at 787-91.

Here, the relevant factors all favor disclosure and demonstrate that the passages at issue are not "Confidential":

- **Plaintiffs have not and cannot invoke any impact to privacy interest, let alone any embarrassment or harm that it would suffer from permitting the limited Requested Disclosure**. *See Cipollone v. Liggett Group, Inc.*, 113 F.R.D. 86 (D.N.J. 1986) (allowing disclosure where no showing of harm). Defendant has requested disclosure of an exceedingly narrow set of discovery information and would redact all of the other passages on those pages of the deposition transcript. *See Charlie H v. Whitman*, 213 F.R.D. 240, 252 (D.N.J. 2003) (permitting disclosure of redacted documents otherwise subject to protective order). Plaintiff's stated concern that "[the] request will lead to

[3] The two cases Plaintiffs cite do not support an alternative standard and are easily distinguishable In *Rosado v. Kissinger*, 2007 WL 9760159, at *3 (M.D. Pa. June 15, 2007) the court *confirms* that *Pansy* applies when a party seeks to modify a protective order. *Id.* at *3 (District Court order failing to apply *Pansy* "enjoyed no presumption of correctness."). And, unlike here, *Rosado* involved a request to lift the entire protective order to disclose sensitive information relating to the Department of Corrections' investigative techniques and sources—information that could very well harm public health and safety were it disclosed. In *Rotex Glob., LLC v. Gerard Daniel Worldwide, Inc.*, 2019 WL 5102165 (M.D. Pa. Oct. 11, 2019), the court declined to reduce the confidentiality designations of sensitive client information because the moving party did not offer an "exacting showing of a need to depart from the parties' prior agreement." Here, Defendant has already demonstrated that need by explaining that these two narrow passages will be used to support its case in the Insurance Action—an action that was not in existence or contemplated at the time the Protective Order was signed. Moreover, unlike the highly sensitive client information at issue in *Rotex*, Defendant is seeking only a limited disclosure of two passages that are not in any way confidential.

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further requests by [Defendant's] insurer or even [Merck] KGaA in the future" *see* May 5, 2020 Email from Bill Krovatin, is entirely unfounded and, even if true, does not evidence harm. Indeed, counsel for either party in the Insurance Action would have the right to issue a non-party subpoena to Plaintiffs in this action seeking far broader discovery of all contentions made by Plaintiffs in support of their false advertising claims in this action. Such a subpoena would be legitimate and would impose substantially more burden on Plaintiffs than the very narrow relief Defendant seeks on this application.

- **The Requested Disclosures are sought for the legitimate purpose of being used to support Defendant's case in the Insurance Action**. *See INVISTA N. Am. Sarl v. M & G USA Corp.*, 2013 WL 1867345, at *2 (D. Del. 2013) (use of documents in another litigation proceeding is legitimate purpose). Permitting disclosure also promotes fairness and efficiency. *See In re Motions for Access of Garlock Sealing Technologies LLC*, 488 B.R. 281, 300 (D. Del. 2013) (permitting use in collateral litigation where it would help the other court make an accurate determination).

- **A person's right to recover from its insurer when it has paid for insurance coverage is important to the public and should not be prohibited.** Furthermore, there is no issue of public heath or safety that will be impacted by this disclosure, nor is confidentiality necessary to protect any public entity or official.

- **Reliance on the Protective Order does not justify denying Defendant's request**. The Protective Order here is a pre-discovery blanket order, and none of the Requested Disclosures described Plaintiffs' business or trade secrets or even any confidential information. Both parties have abided by the Protective Order and refrained from using information discovered in this case in any other litigation, with the understanding that such a pre-discovery order is by its nature subject to modification should the necessity arise. *See Pansy*, 23 F.3d at 790 ("[r]eliance will be less with a blanket order, because it is by nature overinclusive"). Under these circumstances, Plaintiffs' claim that they have relied on the Protective Order and "abided by its terms on the understanding that Merck KGaA would be equivalently limited in its use of discovery from this case in other litigation" simply is not true. To this day, at no point has Plaintiffs ever identified a single instance of information it wanted to disclose in any other litigation, much less non-confidential information about the very causes of action brought in this action. To the

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extent Plaintiffs have information they wish to disclose, Plaintiffs are welcome to raise the issue and seek a meet and confer.[4]

Plaintiffs' professed concerns that allowing modification in these limited circumstances would mean that "[a]greements regarding other discovery materials frequently would last only until a signatory to the protective order decided to use the information elsewhere after all, contrary to its original commitment" ignores the *Pansy* test for modification of a protective order and all of the protections it provides to a non-moving party. Rather than the strawman that Plaintiffs have concocted, Defendant here is seeking permission to disclose only two short passages that Plaintiffs themselves concede are not confidential and that will cause no harm whatsoever to Plaintiffs, for the limited purposes of supporting its case in the Insurance Action without the need to resort to unnecessary, duplicative discovery and subpoena efforts. Any contention otherwise, or that Defendant has done anything but act in good faith to identify the most limited, innocuous passages for disclosure it could find, simply has no merit.

For these reasons, Defendant respectfully requests that the Court order the removal of the Confidential designations from the two passages and permit Defendant to disclose the Requested Disclosures in the Insurance Action.

Plaintiffs' Position

Merck KGaA's demand arises out of litigation between Merck KGaA and its insurance carrier in the District of Massachusetts. Merck KGaA's complaint in that case contends that its insurance carrier owes nearly $30 million in defense costs that Merck KGaA incurred in this case. *See* Insurance Action Dkt. 1 at 1. The parties to that insurance litigation appear to dispute whether the claims in this case fall within the scope of a policy coverage for conduct that "slanders or libels a person or organization or disparages a person's or organization's goods, products or services." *Id.* at 2. After the insurance company rejected Merck KGaA's claim for payment, Merck KGaA filed a lawsuit for declaratory relief. The insurance carrier has moved to dismiss Merck KGaA's complaint arguing that it fails to state a claim under Rule 12(b)(6). Merck KGaA now wants to use the two deposition excerpts from this case in the insurance case.

The Court should deny Merck KGaA's request under the unambiguous terms of the Court-

[4] In contrast to Defendant's narrow request, which seeks the limited disclosure of two short, non-confidential passages in the Insurance, Plaintiffs' request to modify the Protective Order to allow them to generally disclose unspecified materials without justification in other litigations is grossly overbroad and should be denied.

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entered Protective Order.

At the beginning of discovery, the parties engaged in eight months of negotiations over a protective order. Both parties are sophisticated companies and they were represented by able counsel. After substantial negotiations between counsel, the parties ultimately agreed to a stipulated Protective Order that was entered by this Court on March 6, 2017. [Dkt. 67].

Merck KGaA asserts that the deposition testimony in question does not include Merck & Co.'s confidential/trade secret information, but the agreed-upon Protective Order protects discovery beyond that. Paragraph 19 of this Order requires that "[***a]ll documents and information received in discovery*** in this action, including Confidential Material or Attorney's Eyes Only Material and/or EU Personal Data, ***and all other material***, whether or not ultimately made part of the public record, ***shall be used by the receiving party solely for purposes of the above-captioned litigation***, unless set forth otherwise by Court Order, including any appeals, ***and for no other business, litigation or other purpose whatsoever***." [Dkt. 67 ¶19 (emphasis added)].[5] Merck KGaA appears to concede that this language controls and that Paragraph 19 of the agreed to Protective Order prohibits Merck KGaA from using discovery material not "for purposes of [this] litigation" but for "other…litigation" with its insurance carrier. *Id.*

Merck KGaA nonetheless is asking this Court to modify the protective order so that it can use these two excerpts for the prohibited purpose. The Court should reject this request.

First, Merck KGaA is wrong to suggest that it is somehow improper or unintended for the Protective Order to prevent it from disclosing this discovery in its insurance litigation. *See supra*

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[5] Paragraph 19 reads in its entirety: "All documents and information received in discovery in this action, including Confidential Material or Attorney's Eyes Only Material and/or EU Personal Data, and all other material, whether or not ultimately made part of the public record, shall be used by the receiving party solely for purposes of the above-captioned litigation, unless set forth otherwise by Court Order, including any appeals, and for no other business, litigation or other purpose whatsoever. Each party may use in the above-captioned litigation relevant material exchanged in any other litigation between the parties (or their parents, subsidiaries and affiliates) relating to the word 'Merck', whether as all or part of a trademark, trade name, corporate name, firm name, domain name, gTLD, logo or any other use (the 'Global Litigation'). Any such documents and/or information will be presumptively designated as Attorney's Eyes Only Material. This agreement does not waive any relevancy objection by either side. The parties reserve their right to object to the admissibility in this proceeding of any documents from foreign proceedings on any grounds."

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at 3. With the advice of its counsel, Merck KGaA agreed to Paragraph 19. There is no ambiguity in that language. Both parties knew at the time they agreed to the Protective Order and submitted it to the Court that if they pursued some other litigation (including with their insurance carrier) that discovery from this case could not be used. If Merck KGaA wanted a carve-out for insurance litigation, it could have requested one in the Protective Order. Merck KGaA provides no justification for it to back out of the deal, other than because it now suits its interest to do so.

Second, Merck KGaA argues that the information in question does not meet the balancing test for protection based on confidentiality and therefore the Protective Order should be modified. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 790 (3d Cir. 1994) (newspapers challenging district court's sealing of settlement agreement based on confidentiality). But that standard is not applicable here.

The *Pansy* balancing test is used to determine whether a document should be kept confidential from third parties and the public—strangers to the litigation that did not agree to be bound by restrictions imposed by the presiding court, often at the request of the parties. As the Third Circuit explained, the *Pansy* test addresses the interests of those outsiders to the litigation by acknowledging the benefits of "a measure of privacy [for litigants], while balancing against this privacy interest the public's right to obtain information concerning judicial proceedings." *Id.* at 786. But the Protective Order's limit here is not based on confidentiality and is not an attempt to deny public access to the material, which renders the multifactor tests applied in *Pansy* and *Wecht* inapplicable. Rather it is an agreed-to prohibition on a party's use of the material. *See e.g.*, *Rosado v. Kissinger*, 2007 WL 9760159, at *4 (M.D. Pa. June 15, 2007) (distinguishing *Pansy* because "we see no reason to grant a Motion which seeks to obliterate an Order to which the moving party has previously agreed").[6]

If Merck KGaA were correct that the *Pansy* balancing test governs this question, it would seriously undermine the many protective orders that contain provisions similar to Paragraph 19, prohibiting all use of discovery materials in other business and legal settings. It would also render Paragraph 19 entirely superfluous. Such orders would have real force only with regard to highly confidential information. Agreements regarding other discovery materials frequently

[6] Where a party to a protective order seeks to deviate from terms it agreed to, courts instead require that "the party seeking a deviation from the terms of the protective order make[] an exacting showing of a need to depart from the parties' prior agreement." *Rotex Glob., LLC v. Gerard Daniel Worldwide, Inc.*, 2019 WL 5102165, at *6–7 (M.D. Pa. Oct. 11, 2019). Merck KGaA has not even attempted to satisfy this burden.

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would last only until a signatory to the protective order decided to use the information elsewhere, contrary to its original commitment.

The inequity of Merck KGaA's request is made plain by the unilateral nature of the request—it does not ask this Court to modify the Protective Order so that both sides can use non-confidential material in other litigation. Instead, it wants Merck & Co. to remain bound by its commitment not to use any discovery material in the many overseas cases where that material would be useful, while Merck KGaA can be free to use this discovery material in its insurance case.[7]

Ultimately, the question here is not confidentiality or the public's interests, but rather whether Merck KGaA will continue to be bound by the commitment it made about how *it* will use material that Merck & Co. provided in discovery in this case. Instead of a document-by-document limitation, confined to confidential information, both parties—with the assistance of counsel—agreed to limit their use of discovery material across the board. Merck & Co. has lived with and abided by this limit for three years, sometimes to its detriment by not being able to use discovery in this case in the overseas litigation brought by Merck KGaA. Merck KGaA should not be able to breach its agreement just because it finds it advantageous to do so. Merck KGaA's suggestion that if Merck & Co. wants to use discovery from this case in other litigation all it needs to do is approach Merck KGaA in a meet and confer and then raise the issue with Your Honor is precisely the type of document by document analysis that Paragraph 19 is designed to prevent.

Finally, even if the *Pansy* balancing test did apply, the factors would not weigh in favor of Merck KGaA's unilateral modification. Most notably *Pansy* considers: "the reliance by the original parties on the confidentiality order." *Id.* at 790. Merck & Co. has relied on the order since it was entered. It has abided by its terms on the understanding that Merck KGaA would be equivalently limited in its use of discovery from this case in other litigation. This factor only has decreased importance when the entry of the Protective Order was "improvidently granted" in the first place, something that Merck KGaA does not even contend here. *Id.* at 790.[8] In addition, Merck KGaA's intended disclosure is irrelevant to public health and safety, and there are no

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[7] If the Court is inclined to modify the Protective Order, Merck & Co. respectfully requests that the modification apply equally to both parties.

[8] Merck KGaA states above that it "simply is not true" for Merck & Co. to claim that it "relied on the Protective Order and 'abided by its terms on the understanding that Merck KGaA would be equivalently limited in its use of discovery from this case in other litigation.'" It is hard to understand what Merck KGaA means by this, particularly because it states in just the previous sentence that it in fact has abided by the terms of the Protective Order.

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public entities involved or public issues at stake in a private dispute between a company and its insurance carrier. *See Pansy*, 787-91; *supra* at 3 (*Pansy* factors 4, 6, 7). Nor would Merck KGaA's disclosure promote fairness and efficiency in the insurance litigation—if the insurance case does proceed to discovery, the court in that case can supervise any appropriate third-party discovery with the involvement of the insurer and Merck & Co. *Id.* (*Pansy* factor 5). Thus, even under *Pansy* the request should be denied.

Notably, Merck KGaA does not volunteer its own discovery to show that what it contests in this case would fall under its insurance policy. Nor does Merck KGaA contend that it has explored other means of advancing its insurance litigation that do not run contrary to the protective order here. These failings undermine Merck KGaA's demand here.

The Court should deny Merck KGaA's request to avoid the plain and unambiguous terms of the Protective Order.

Respectfully submitted,

/s/ Stephen M. Orlofsky

STEPHEN M. ORLOFSKY

SMO:
Enclosure

Cc: All counsel of record (via ECF and email w/enclosure)

EXHIBIT A

Wang, Zheng

From: Krovatin, Bill <william_krovatin@merck.com>
Sent: Thursday, May 07, 2020 3:51 PM
To: Jonas Koelle
Cc: Krovatin, Bill
Subject: RE: disclosure request

Jonas - Thanks for your email. I have always approached our interactions and dealings in good faith and do not appreciate any implication otherwise.

What both sides agreed to in the protective order in this case was that the use of discovery material for any other litigation regardless of its confidentiality was prohibited. We see no reason for us to deviate from that bargain now. Sidley will contact your counsel regarding our part of the joint submission to the court.

Best regards,
Bill Krovatin
Merck – Office of General Counsel
732-594-0221
Administrative Associate: Ciara Pretlow (732) 594-1988

From: Jonas Koelle <Jonas.Koelle@merckgroup.com>
Sent: Thursday, May 7, 2020 5:05 AM
To: Krovatin, Bill <william_krovatin@merck.com>
Subject: AW: disclosure request

EXTERNAL EMAIL – Use caution with any links or file attachments.
Dear Bill -

We are disappointed by your response. There is absolutely nothing confidential in the information our company seeks to disclose, and we can see no good faith justification for MSD's refusal to cooperate or, for that matter, the original, over-broad designation in the first place. MSD's objection – because it might "lead to further requests" – runs directly counter to the Court's Protective Order and the applicable law.

I should also note that MSD's actions are in stark contrast to previous dealings in this case where MSD has requested on multiple occasions that we downgrade the confidentiality of documents or remove redactions so that MSD could share the information more broadly. On each of those occasions, we responded in good faith by agreeing to make downgrades or remove redactions unless there was a true basis for keeping the designations or redactions as is.

Absent your agreement, we will have no choice but to seek relief from the Court. Please provide us, no later than May 11, with either your agreement to our request or MSD's half of the requisite joint letter raising this issue with Judge Hammer.

Best regards,
Jonas

Jonas Kölle
General Counsel Trademarks | Rechtsanwalt
Head of LE-T Trademarks, Designs & Copyright
Group Legal & Compliance | Trademarks, Designs & Copyright

Merck

Merck KGaA | Frankfurter Str. 250 | Postcode: F 128/002 | 64293 Darmstadt | Germany
Phone: +49 6151 72 5303 | Fax: +49 6151 72 3378
E-mail: jonas.koelle@merckgroup.com | www.merckgroup.com

Von: Krovatin, Bill <william_krovatin@merck.com>
Gesendet: Mittwoch, 6. Mai 2020 18:48
An: Jonas Koelle <Jonas.Koelle@merckgroup.com>
Betreff: RE: disclosure request

Jonas – I appreciate your dilemma but we are unable to agree to your proposal. We are concerned that agreeing to your request will lead to further requests by your insurer or even KGaA in the future.

Best,
Bill Krovatin
Merck – Office of General Counsel
732-594-0221
Administrative Associate: Ciara Pretlow (732) 594-1988

From: Jonas Koelle <Jonas.Koelle@merckgroup.com>
Sent: Wednesday, May 6, 2020 10:35 AM
To: Krovatin, Bill <william_krovatin@merck.com>
Subject: WG: disclosure request

EXTERNAL EMAIL – Use caution with any links or file attachments.
Dear Bill,

I would like to get back to this issue and kindly ask you to consent to our use of the language included in my earlier email in the Insurance Litigation.

Please let me know in case you need additional information from our end.

Thanks and best regards,
Jonas

Jonas Kölle
General Counsel Trademarks | Rechtsanwalt
Head of LE-T Trademarks, Designs & Copyright
Group Legal & Compliance | Trademarks, Designs & Copyright

Merck

Merck KGaA | Frankfurter Str. 250 | Postcode: F 128/002 | 64293 Darmstadt | Germany
Phone: +49 6151 72 5303 | Fax: +49 6151 72 3378
E-mail: jonas.koelle@merckgroup.com | www.merckgroup.com

Von: Jonas Koelle
Gesendet: Freitag, 1. Mai 2020 14:56
An: Krovatin, Bill <william_krovatin@merck.com>
Betreff: disclosure request

ATTORNEY CLIENT COMMUNICATION / PRIVILEGED & CONFIDENTIAL

Dear Bill,
As you may be aware, Merck KGaA is currently in litigation with its insurer HDI (the "Insurance Litigation"). In connection with the Insurance Litigation, we need to disclose certain information related to US Merck's allegations regarding the 125 Year Campaign and the Original Campaign. The specific language we need to disclose is listed in the chart below.

Language	So
[redacted]	Ha Re 53
[redacted]	De 72
[redacted]	De

[redacted]

These excerpts were included in documents that were designated as Confidential or Attorneys' Eyes Only in their entirety, but there is nothing confidential about these particular excerpts. Please confirm that US Merck agrees to remove the Confidential and Attorneys' Eyes Only designations for these excerpts or that you consent to our use of these excerpts in the Insurance Litigation without restriction.
Given the deadlines in the Insurance Litigation, we would appreciate receiving your consent by May 5.

Thank you for your consideration of this matter.

All the best,
Jonas

Jonas Kölle
General Counsel Trademarks | Rechtsanwalt
Head of LE-T Trademarks, Designs & Copyright
Group Legal & Compliance | Trademarks, Designs & Copyright

Merck

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Phone: +49 6151 72 5303 | Fax: +49 6151 72 3378
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EXHIBIT B

Hemmendinger, Sarah

From: Bernstein, David H. <dhbernstein@debevoise.com>
Sent: Friday, May 29, 2020 7:23 AM
To: Akowuah, Kwaku
Cc: Hamid, Jyotin; Hopson, Mark D.; De, Sona; Merck MSD – Associates; Hemmendinger, Sarah; Bannigan, Megan K.; Mundel, Benjamin
Subject: RE: MERCK & CO., INC. et al v. MERCK KGAA

Kwaku, as I understand it, the standard for whether our unredacted letter and the transcript of the recent conference should be sealed is essentially the *Pansy* standard, which Judge Hammer has already addressed. As such, we do not have a good faith basis for joining in such a request. Accordingly, if you believe these materials should be kept under seal, please make your motion and we will evaluate the bases that you identify in deciding whether to oppose it. David

David H. Bernstein | Partner | Debevoise & Plimpton LLP | dhbernstein@debevoise.com | +1 212 909 6696 | 919 Third Avenue, New York, NY 10022 | www.debevoise.com

From: Akowuah, Kwaku [mailto:kakowuah@sidley.com]
Sent: Friday, May 29, 2020 10:02
To: Bernstein, David H.; Mundel, Benjamin
Cc: Hamid, Jyotin; Hopson, Mark D.; De, Sona; Merck MSD – Associates; Hemmendinger, Sarah; Bannigan, Megan K.
Subject: RE: MERCK & CO., INC. et al v. MERCK KGAA

David,

With respect to the sealing question you raised at Wednesday's status conference, we believe the deposition excerpts and court transcript should remain under seal on the D.N.J. docket. This approach is most consistent with the protective order and the court's ruling granting a narrow modification of that order in order for your client to use the cited discovery in the D. Mass. insurance litigation. That ruling does not require publication. Accordingly, there are steps your client should take to protect information from third-parties in the Massachusetts court.

Your client's asserted need to use the two deposition excerpts in the D. Mass. insurance litigation will still be met if you (i) file the excerpts and any discussion of this discovery under seal in the D. Mass. litigation, and (ii) take steps to ensure that your client and its adversary in that litigation agree that this discovery will be treated as confidential and will be used solely for the purposes of the D. Mass. litigation.

Please let us know if there is any D. Mass. rule that precludes this approach.

Best,
Kwaku

KWAKU A. AKOWUAH

SIDLEY AUSTIN LLP